

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

In re: BOY SCOUTS OF AMERICA
AND DELAWARE BSA, LLC,

Debtors.

NATIONAL UNION FIRE INSURANCE
CO. OF PITTSBURGH, PA, et al.,

Appellants,

v.

BOY SCOUTS OF AMERICA AND
DELAWARE BSA, LLC,

Appellees.

Chapter 11

Bankruptcy Case No. 20-10343 (LSS)
(Jointly Administered)

Case No. 22-cv-01237-RGA

**MOTION OF THE CERTAIN INSURERS
TO SUPPLEMENT THE RECORD**

The Certain Insurers,¹ by and through undersigned counsel, hereby move to supplement and designate certain documents in the appellate record to include recently filed materials in the bankruptcy court that provide further support for the Certain Insurers' argument that the claimant groups structured the bankruptcy plan to prejudice non-settling insurers' contractual rights, and that BSA acceded to those demands. In these filings, the claimant groups tout their integral role in drafting and designing the plan and their anticipation that the plan will prejudice the Certain

¹ Defined terms have the meanings set forth in the Certain Insurers' appellate briefs at D.I. 45 & 109. References to "D.I." refer to filings in this appeal. References to "Bankr. D.I." refer to filings in the bankruptcy court.

Insurers. In support of the motion, the Certain Insurers state as follows:

BACKGROUND

1. Following confirmation of the Chapter 11 plan on September 8, 2022, the Certain Insurers, Lujan claimants, and D&V claimants, among others, filed notices of appeal on September 22, 2022. Their appeals were procedurally consolidated on October 17, 2022. *See* D.I. 22.

2. Pursuant to a stipulation agreed by the parties and so-ordered by the Court, on October 3, 2022, the Certain Insurers, Lujan claimants, and D&V claimants submitted timely designations of items to be included in the appellate record, including transcripts of and evidence admitted at the confirmation hearing and numerous bankruptcy court filings. D.I. at 5; Statement of Issues on Appeal and Designation of Record, *The Lujan Claimants v. Boy Scouts of America & Delaware BSA*, No. 22-cv-01258-RGA (Oct. 3, 2022), D.I. 6; *D&V Claimants v. Boy Scouts of America & Delaware BSA*, No. 22-cv-01259-RGA (Oct. 3, 2022), D.I. 6. The appellees submitted a counter-designation of record designating additional bankruptcy court filings. D.I. 15.

3. Pursuant to the same stipulation and the Court-ordered briefing schedule, between November 7 and December 21, 2022, the parties completed

merits briefing on the appeals.² *See* D.I. 22. In that briefing, the Certain Insurers argued that claimants’ counsel had insisted upon provisions in the bankruptcy plan that prejudice the non-settling insurers’ contractual rights and otherwise violate the Bankruptcy Code’s requirement of a proper bankruptcy purpose.

4. Just one week after the briefing in this Court closed, certain claimants’ counsel filed fee applications in the bankruptcy court that provide significant further evidence supporting the Certain Insurers’ points. On December 29, 2022, certain claimants’ counsel (plan supporters, the Coalition and Pfau/Zalkin) filed motions seeking bankruptcy court approval of BSA’s payment of professional fees as compensation for their “substantial contributions” to BSA’s plan of reorganization, as did the Roman Catholic Ad Hoc Committee, a non-party to these appeals. *See* Bankr. D.I. 10808 (the “Coalition Fee Request”); Bankr. D.I. 10809 (the “Pfau/Zalkin Fee Request”); Bankr. D.I. 10815 (the “RCAHC Fee Request”).³ The total amount sought in the three motions exceeds \$25 million.

² On November 7, the Certain Insurers filed opening briefs. D.I. 43; D.I. 45 (“Ins. Br.”). On December 7, the plan proponents, including BSA, the TCC, the Coalition, the Pfau/Zalkin Claimants (“Pfau/Zalkin”), and the FCR, filed responsive briefs. D.I. 66, 81, 89. On December 21, the Certain Insurers filed replies. D.I. 109 (“Ins. Reply”); D.I. 111.

³ Given the Court’s instruction not to submit papers that are available on public dockets, the Certain Insurers have not attached copies of these fee requests or the challenged decision and order from the bankruptcy court. The Certain Insurers can provide copies of any such papers requested by the Court.

5. Although these filings were submitted after the briefing on these appeals closed, claimants' counsel had executed many of the supporting declarations more than a month earlier, on November 23. By November 23, the Certain Insurers had filed their opening briefs asserting improper influence by these same counsel. Rather than present these petitions to the bankruptcy court during the appellate briefing period, these counsel waited until the briefing period closed.

6. The motions' return date is February 21, 2023. BSA has committed to supporting all three motions.⁴

7. In order to provide a full appellate record and to ensure consideration of these relevant filings in these appeals, the Certain Insurers respectfully request that this Court supplement the designated record with the Coalition, Pfau/Zalkin, and RCAHC Fee Requests found on the bankruptcy docket at Bankr. D.I. 10808, 10809, and 10815, any subsequent briefs filed in support or opposition to those motions, and any transcripts of court hearings in connection with the motions, and take judicial notice of plan supporters' statements therein.

⁴ On January 12, 2023, the TCC filed a "response" to the Coalition and Pfau/Zalkin Fee Requests. *See* Bankr. D.I. 10861. The TCC's response is consistent with the points made in this motion.

ARGUMENT

8. Federal Rule of Bankruptcy Procedure 8009(a) permits an appellant to file and serve a designation of items to be included in the record within 14 days after its notice of appeal. The plan supporters, however, filed these motions on December 29, 2022, preventing the Certain Insurers from designating them in the record and addressing them, as warranted, in their appellate briefing.

9. This Court should enter an order granting the motion to supplement the record with these new filings, which are publicly available on the bankruptcy court docket, and take judicial notice of the statements therein. *See, e.g.*, Fed. R. Bankr. Proc. 8009(e)(3) (A party may present “questions as to the form and content of the record to the court where the appeal is pending.”); Fed. R. Bankr. Proc. 8028 (for “cause in a particular case,” the district court “may suspend the requirements” of Bankruptcy Rule 8009).

10. A “district court is authorized to supplement the record in a bankruptcy appeal and to take judicial notice of appropriate evidence.” *Patel v. Hughes*, 2022 WL 3010526, at *1 n.2 (M.D. Tenn. July 28, 2022); *see In re Indian Palms Assocs.*, 61 F.3d 197, 204-06 (3d Cir. 1995) (explaining that a party can designate documents from related proceedings and the court can otherwise take judicial notice of them).

11. Had these filings been available when the Certain Insurers submitted their designation, the Certain Insurers would have designated them in the record and

cited them in their briefing, particularly the statements made in the Coalition and Pfau/Zalkin Fee Requests.

12. For example, the Certain Insurers explained in their briefing that the plan is a result of a “claimant-driven process.” Ins. Br. 17-51, 60-64; Ins. Reply 13-37. The plan supporters argued that BSA “had the pen, not the survivors,” and negotiated to “protect the interests of the Insurers” against the efforts of the claimants. *See* BSA Br. at 68-77, 101; Claimant Br. at 34-36. But the Coalition and Pfau/Zalkin Fee Requests support the Certain Insurers’ assertion. *See, e.g.*, Bankr. D.I. 10808 ¶¶ 8, 32-34, 37-38, 46 (“[T]he Coalition took a lead role in negotiating and drafting” the RSA), ¶ 61 (“The Coalition’s counsel was the primary architect of the post-1976 Chartered Organization proposal and drafted the plan language necessary to implement it.”), ¶ 65 (“The Coalition’s counsel and Century’s counsel were the primary drafters of the Century Term Sheet”), ¶¶ 129-132 (The prejudicial insurance findings were “requested by the Coalition.”); *see also* Bankr. D.I. 10809 ¶ 9 (“The members of the Coalition represented the interests of the vast bulk of abuse claims, sufficient to deliver an affirmative vote”).

13. The Certain Insurers further explained that counsel for the claimants seek to “inflate” claims and “bind insurers to gain an advantage in coverage litigation—all in an effort to enrich themselves.” Ins. Br. 17-22, 25-31, 37-45, 61, 63, 67; Ins. Reply 14-22, 26-32. The plan supporters argued that the plan “does not

inflate claims” and “does not require the insurers to pay awards.” BSA Br. at 55-67; Claimant Br. at 41-46, 51. But the Coalition and Pfau/Zalkin Fee Requests support the Certain Insurers’ assertions. *See, e.g.*, Bankr. D.I. 10808 ¶ 10 (“As a result of the Coalition’s hard work, Survivors will receive enhanced compensation.”), ¶¶ 129-132 (“[I]nsurers will be hard pressed” to make arguments in coverage litigation); Bankr. D.I. 10808 at ¶ 95 n.18; Bankr. D.I. 10809 at ¶ 42 (seeking, with BSA’s support, \$24.5 million in fees from the BSA estate).

14. The Certain Insurers also explained that BSA “acceded to further requests to prejudice non-settling insurers” following a failed vote on the plan, including by “agree[ing] to amend the Plan to add an ‘Independent Review Option’ (‘IRO’) for the claimants to access additional insurance proceeds” that was “designed . . . to target ‘excess’ insurers [and] create further settlement pressure.” Ins. Br. 45-50; Ins. Reply 35-37. BSA argued that the IRO is intended merely to reflect “prepetition settlement practices.” BSA Br. at 112-14. But the Coalition and Pfau/Zalkin Fee Requests support the Certain Insurers’ assertions. *See, e.g.*, Bankr. D.I. 10809 ¶ 4 (“Pfau/Zalkin’s contributions . . . include (i) conceiving, negotiating, and designing the Independent Review Option”), ¶ 28 (“[T]he IRO created a mechanism to access excess insurance coverage that was otherwise at risk of being lost”); D.I. 10808 ¶¶ 84-85, 89 (Pfau/Zalkin “proposed an independent review process” in “consultation with counsel for the Coalition and the FCR”).

15. The Certain Insurers further argued that BSA acceded to claimants’ demand for a “so-called ‘Document Appendix’” that “would permit claimants’ attorneys to wield vast discovery power *before* submitting claims to the trust so they can repair defects and facilitate recovery for thousands of claims they filed.” Ins. Br. 50-51; Ins. Reply 35. The plan supporters did not attempt to defend the Document Appendix, and the Coalition and Pfau/Zalkin Fee Requests support the Certain Insurers’ assertions. *See, e.g.*, Bankr. D.I. 10809 ¶ 4, 30 (Pfau/Zalkin “negotiat[ed] and draft[ed] the Document Appendix to provide procedures for discovery” so “survivors could better prove up claims.”).

16. The publicly available statements in these filings can be accurately and readily determined from a review of the bankruptcy court docket. And they are not subject to dispute, because they are concessions by the plan supporters in bankruptcy court filings. *See* Fed. R. Evid. 201(b)(2), (d); *see also, e.g., Indian Palms Assocs.*, 61 F.3d at 205-06 (“[I]t is not seriously questioned that the filing of documents in the case record provides competent evidence of certain facts—that a specific document was filed, that a party took a certain position, that certain ... admissions were made.” (quotation marks omitted)).

17. Finally, the Appellees will not suffer prejudice as a result of the requested relief. *See Adelpia Commc’ns*, 2008 WL 3919198, at *1 n.1 (S.D.N.Y.

Aug. 22, 2008). The filings are by and with the support of the Appellees themselves, and the Certain Insurers make no new arguments on appeal through this motion.

WHEREFORE, the Certain Insurers respectfully request that the Court grant this motion to supplement the record and to designate the documents at Bankr. D.I. 10808, 10809, and 10815, as well as any subsequent briefs or transcripts in connection with those motions, as part of the record, to take judicial notice of the plan supporters' statements therein, and to grant the Certain Insurers such other and further relief as the Court deems just and proper.

Dated: Wilmington, Delaware
January 13, 2023

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CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type-volume limitation of Federal Rule of Bankruptcy Procedure 8013(f). A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the motion, excluding the items set forth in Federal Rule of Bankruptcy Procedure 8015(g), is 1,844.